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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1273 89.

GLORIA STOLLAR,

Petitioner,

vs.

RICHARD B. OGILVIE, SHERIFF OF COOK COUNTY, ILLINOIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

BRIEF FOR RESPONDENT IN OPPOSITION.

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OPINIONS BELOW.

The opinion of the Supreme Court of Illinois on the present habeas corpus proceeding is reported at 36 Ill. 2d 261, 222 N. E. 2d 496, and reprinted in Appendix A of the Petition. The opinion of the Supreme Court of Illinois on the original contempt appeal is reported at 31 Ill. 2d 154, 201 N. E. 2d 97, and is reprinted in Appendix B of the Petition.

JURISDICTION.

The jurisdiction of this Court is invoked by petitioner pursuant to 28 U. S. C. § 1257 (3).

QUESTIONS PRESENTED.

1. Is the right to trial by jury guaranteed by the Sixth Amendment to the United States Constitution applicable to a State Criminal contempt proceeding?

2. Assuming such applicability, does the failure of petitioner to request a trial by jury at any time during the proceedings constitute a waiver of any such right?

STATEMENT OF THE CASE.

A complete and comprehensive statement of facts has previously been submitted by respondent in his Brief in Opposition to a Petition for Certiorari which was denied by this Court (380 U. S. 912, 85 S. Ct. 898, 13 L. Ed. 2d 798), and Respondent respectfully requests the incorporation of such statement in the present proceeding.

With respect to petitioner's statement of the case, respondent deems it necessary to make several additions and clarifications. First, petitioner has failed to detail the fact that on April 12, 1965, a petition was filed on her behalf in the United States District Court, Northern District of Illinois, Eastern Division, under Title 28, United States Code, Section 2241 et seq., alleging violations of federal constitutional rights arising out of the original section of the then Probate Court of Cook County, Illinois in November, 1962 (65-C-561). Such petition, after a plenary hearing before Judge Igoe, was denied on June 30, 1965. A copy of findings of fact and conclusions of law, coupled with a judgment order is set forth in full in the Appendix to the brief in the Supreme Court of Illinois (Appellee's Brief, Supreme Court of Illinois, No. 39768). Secondly, at no time during the original contempt case did petitioner or her attorney request a trial by jury. (See Appendix A, Petition for Writ of Certiorari.) Thirdly,

while the Supreme Court of Illinois decided the instant cause based on the precedent espoused in *People* v. *Bloom*, 35 Ill. 2d 255, it is error to state that the latter court ignored the constitutional claims of petitioner presented there.

Finally, while petitioner now raises the constitutional claim of denial of equal protection under the Fourteenth Amendment to the United States Constitution, such claim was never presented at any other stage of the proceedings in this cause. Since the issue of equal protection was not properly raised in the state court proceedings, it is not considered a substantial or proper basis for the granting of the petition. (*Zucht* v. *King*, 260 U. S. 174.)

ARGUMENT.

I.

The Right to Trial by Jury Guaranteed by the Sixth Amendment to the United States Constitution Is Not Applicable to a State Criminal Contempt Proceeding.

In *Levine* v. *United States,* 362 U. S. 610, a majority of this Court held that the right of a public trial in all criminal prosecutions did not include proceedings involving criminal contempt of Court. It was there stated (p. 616):

> "Procedural safeguards for criminal contempts do not derive from the Sixth Amendment. Criminal contempt proceedings are not within 'all criminal prosecutions' to which that Amendment applies. *Ex parte Terry,* 128 U. S. 289, 306-310; *Cooke* v. *United States,* 267 U. S. 517, 534-535; *Offutt* v. *United States,* 348 U. S. 11, 14. But while the right to a 'public trial' is explicitly guaranteed by the Sixth Amendment only for 'criminal prosecutions,' that provision is a reflection of the notion, deeply rooted in the common law, that 'justice must satisfy the appearance of justice.' *Offutt* v. *United States,* 348 U. S. 11, at 14. Accordingly, due process demands appropriate regard for the requirements of a public proceeding in cases of criminal contempt, see *In re Oliver,* 333 U. S. 257, as it does for all adjudications through the exercise of the judicial power. . . ."

The reasoning of *Levine* has been extended, in succeeding years, to criminal contempt cases where the issue presented involved a constitutional claim for trial by jury. (*United States* v. *Barnett,* 376 U. S. 618.) Even when the Court recently subscribed to the doctrine of trial by jury in federal criminal contempt cases where sentence exceeded

six months, such rationale was bottomed, not upon a constitutional right, but upon the supervisory power over lower federal tribunals. (*Cheff* v. *Schnackenberg,* 384 U. S. 373.) To honor petitioner's claim in the instant cause would be to (1) make the Sixth Amendment right of trial by jury applicable to state criminal proceedings; (2) define a criminal contempt as a "criminal prosecution" within the meaning of the Sixth Amendment, and (3) overrule *Levine* v. *United States,* 362 U. S. 610, or at least the concept there enunciated, which expressly refused to embody the procedural safeguards of the Sixth Amendment in cases of criminal contempt.

It is the position of Respondent that the necessary action which must be taken to validate petitioner's claim would constitute a serious impediment to the inherent power of state court tribunals in the administration of justice.

II.

Assuming The Applicability of the Constitutional Right to Trial by Jury in a State Criminal Contempt Proceeding, Petitioner's Failure to Request a Jury Trial, and Her Contrary Actions At the Original Proceedings Constitute a Waiver of Such Right.

At the original contempt hearing on November 14, 1962, the petitioner made the following statements to the court at the inception of such proceeding:

(Abstract of Record, *People* v. *Stollar,* 31 Ill. 2d 154, 201 N. E. 2d 97, No. 37796, pp. 48-49; Transcript of Record, pp. 352-353.)

"My name in Gloria Stollar. I live at 4880 Marine Drive, Chicago, I am the same Mrs. Stollar who was appointed guardian of Jacqueline H. Stollar, a minor. That is my daughter. I have indicated to you and to my attorney and the court that I am willing to inform the court of all that has occurred in the performance

of my duties as guardian of this estate. I do this voluntarily and I am placing myself at this time at the mercy of the court as to this court's judgment as to what punishment, if any, I should receive, and I promise now to testify to the best of my ability. No one is coercing me to do this. The court has not made any promise that judgment and punishment of this Court will be any less than what I should receive." (Abstract of Record attached as Exhibit A.)

Furthermore, this Court, in setting forth the statement of facts in the case of *People* v. *Stollar,* 31 Ill. 2d 154, stated (p. 158):

"At the outset of the hearing, the guardian ad litem represented to the court, in the presence of respondent and her attorney, that her attorney had agreed that if the record so warranted, he would 'consent and agree to vacating the order of appointment of Mrs. Stollar as guardian. If there is a finding of fraud of both the inventory and current account, he is still willing to leave it up to the mercy of the court as to any judgment or punishment that Mrs. Stollar should receive.' . . . The court inquired as to whether this statement was satisfactory to Mrs. Stollar and then announced that it was satisfactory to both her and her attorney. Moreover, the plaintiff in error testified that she had voluntarily indicated that she was willing to inform the court of all that had occurred in the performance of her duties as guardian of the estate and to place herself on the mercy of the court. She testified that she was not coerced to do this and that the court had made no promise that the judgment and punishment of the court 'will be any less than you should receive'."

In light of the posture of the record, it is clear that petitioner has validly and of her own volition, waived the constitutional right which she now directs this court to honor. (*Cheff* v. *Schnackenberg,* 384 U. S. 373.)

It has long been established that the State and Federal Constitutional requirements of a jury trial is not jurisdic-

tional, but is a privilege which a defendant may waive with the consent of the court, provided the waiver is expressly, intelligently, and understandingly made. (See *Adams* v. *U. S. ex rel McCann,* 317 U. S. 269; *United States* v. *Sorrentino,* 175 F. 2d 721, involving waiver of other Sixth Amendment rights under the established standards: Also, *People* v. *Wesley,* 30 Ill. 2d 131.)

The petitioner's actions at the original hearing, and the statements of her attorney, in which she not only acquiesced, but expressly approved, lend substantial support to the proposition that an express, intelligent and understanding waiver of a right to trial by jury was made by her.

CONCLUSION.

Respondent respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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